IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO. 697 OF 2002

IN

SUIT NO. 55 OF 2001

IN

PETITION NO. 689 OF 2001

Prashant Apankar ....*Plffs.*
vs.
Phyllics Fernandes and Ors ....*Defnds*
AND
Coyylome Builders and Anr. ...*Resps.*

Mr. Arif Bookwala i/b. Ranjit and Co. for the plffs.
Mr. Owen Menzes i/b. I.S. Mecwan for Resps.

CORAM: S.U. KAMDAR, J.

DATE : 23RD JUNE, 2005.

P.C. :

1. The present notice of motion is initiated for various reliefs. However both the parties state that they are restricting their

case only to prayer clause (a). By prayer (a) of the notice of motion the plaintiff is seeking that the Court Receiver, High Court, Mumbai should be appointed as Receiver inrespect of flat no.101 and 102 situated at Plot No.91, St. Andrew's Road, Bandra, Mumbai-400 050 alongwith two car parking spaces shown as Item no. 3 and 4 of the schedule-I to the petition for probate. In so far this part of the prayer (a) is concerned both the parties agree that flat no.101 and one car parking space was the subject matter of earlier order dated 4.3.2004 which was passed while disposing of the present notice of motion earlier. Under the said order the defendant no.1 was permitted to occupy the said flat no.101 alongwith the car parking space. Under the said order various other directions were also given. Against the said order an appeal was preferred being Appeal No. 399 of 2004. The said appeal was finally heard by the Division Bench which partly allowed the same. In so far as flat no.101 is concerned the order has been upheld and thus at this stage the question of appointment of

court receiver in so far as flat no. 101 is concerned does not arise.

2. In so far as flat no.102 is concerned both the parties agree that the said flat alongwith the car parking space be sold. Both the parties agree that for the limited purpose of selling the said flat the court receiver should be appointed. The respondent builder is directed to hand over possession of the said flat no.102 situated at Plot No.91, St. Andrew’s Road, Bandra, Mumbai-400 050 alongwith car parking space thereof to the Court Receiver, High Court, Mumbai within a period of four weeks from the date of communication of the present order. The receiver on receipt of the possession of the said flat shall proceed with the sale of said flat alongwith the car parking space. The said sale will be sold by public auction and after giving advertisement in the two newspapers thereof. The plaintiff undertakes to pay the advertisement and other charges of the court receiver for the sale of the said flat. The said amount shall be

reimbursed to the plaintiff from sale proceeds of the said flat by Court Receiver. The sale proceeds of the said flat will be invested by the court receiver in fixed deposit of any nationalised bank initially for three years and renew the same from time to time and the said amount will be subject to the final decision in Probate Petition No. 689 of 2001.

3. Prayer clause (a) of the Notice of Motion also claims relief inrespect of amount of Rs.33,00,000/- invested by the deceased jointly with the respondent no.3 in ICICI bonds. Learned counsel appearing for plaintiff states that this amounts forms part of the estate of the deceased and thus requires to be protected till and until the Probate Petition which is now converted into a suit is finally heard and decided. On the other hand defendant no.3 inter-alia contends that the said amount invested in bonds does not form part of estate of the deceased and thus does not required to be brought in the court to the credit of the present suit for the purpose of

distribution thereof in accordance of the final decision in the present petition. It is his contention that the ICICI bonds were obtained under the joint name of the deceased and the defendant no.3. It is his further contention that the said ICICI bonds were obtained subsequent to the execution of the will which is dated 17.2.2000. It is his contention that once a joint investment under ICICI bonds has been made by the deceased subsequent to the execution of the will it does not form part of the estate of the said deceased but the intention of the deceased was to give exclusively the said bonds to the defendant no.3. However he admits that the said bonds have been encashed by him from time to time sometime in or about March or April, 2003 i.e. during the time when the present notice of motion was pending in this court. Learned counsel appearing for defendant no.3 has inter-alia contended that he is entitled to the said amount under the bond on the basis of principle of survivorship and insupport of his contention he has relied upon the judgment of

this court in the case of **Cedric X. Pinheiro v. Smt.Josefina Remedios reported in 1998 Bank, J. particularly para-8 and 9 thereof.**

> "8 There is no dispute that Fixed Deposit Receipt No. 208 of 1975 (No.244 of 1986) was taken somewhere in the year 1975 that is after the execution of the will and that the savings account had been opened on February 2, 1972, i.e. prior to the execution of the said will. There is also no dispute that the amounts lying in the fixed deposit and in the savings bank account belonged to Fr. Damaso D'lima. Likewise, there is no dispute relating to the proposition of law which is applicable and which has been enumerated in a number of authorities quoted by the learned advocates for the parties including the Division Bench ruling of this court in Krushanadas Nagindas Bhate v. Bhagwandas Ranchhoddas AIR., 1976 Bom. 153.
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> 9 The question to be decided is as to what was the intention of the deceased, Fr. Damaso D'Lima, namely, whether the intention was to make the survivor the owner of the amount or that the said amount should go to the heirs and the same has to be gathered from the facts and circumstances on record. Under the will dated October 16, 197 Fr. Damaso D'lima had constituted respondent no.1 as his sold and universal heir. In so far as Savings Bank Account No.2245 (No.12164) is concerned, the said account was opened on February 2,

> 1972, payable to either or survivor, namely, original plaintiff or Fr. D'lima. However, by will dated October 16, 1974 it was clearly expressed by Fr. D'lima that any sums of money deposited in any banks would go to the respondent no.1 under the said Will. Therefore, in so far as Savings Account No.2245 (No.12164) is concerned, the will is a clear expression of the intention of Fr. Damaso D'lima that all sums of money deposited by him in banks prior to October 16, 1974 should go to respondent no.1. The subsequent deposit of amount in Fixed Deposit No. 208 of 1975 (No.224 of 1986) in the year 1975, which was payable to the original plaintiff and/or Fr. D'lima on the principle of either or survivor, does not in any manner help the contention advanced by the learned advocate, Shri Kantak, that a contrary intention to the one expressed in the Will can be attributed to Fr.D'lima in so far as Savings Bank Account No.2245 (No.12164) is concerned, in my opinion, the will dated October 16, 1974 clearly sets at the rest of the controversy relating to Savings Bank Account No. 2245 (No. 12164) in favour of respondent no.1."

4. He has further contended that in any event under the said will of which probate is sought the said amount does not come to the share of the plaintiff herein and thus he is not entitled to maintain the present notice of motion for the aforesaid reliefs. He has further

contended that in any event if the said will is not probated and found to be invalid then in that event also the share of the plaintiff in the said amount is only Rs.4.00 lacs as under the Indian Succession Act the one- third estate of the deceased goes to the wife who is the mother of the plaintiff and the balance has to be distributed amongst five legal heirs who are the children of the said deceased. He has contended that at the highest the amount which comes to the share of the plaintiff is merely Rs.4.00 lacs and thus no order can be passed inrespect of the entire amount of Rs.33.00 lacs which was the amount invested in the said bonds.

5. I have considered the rival contentions of the parties and at the outset it is important to note that I am deciding the application at the inter-locutory stage and I am not deciding the rights of the parties finally nor I am also not determining an eventuality which may arise either on the will being probated or the petition being dismissed and the court

refusing to accept the said will. At the inter-locutory stage in my opinion it is necessary that all the amount which forms part of the estate of the deceased which admittedly includes the ICICI bonds since the deceased was the first holder of the said bonds is required to be protected and preserved so that ultimately available for distribution of the assets on the basis of final decision arrived in the probate petition. In so far as the judgment of the learned single judge of this court in the case of Cedric X. Pinheiro(supra) is concerned the learned single judge has held that the intention of the deceased must be gathered in the cases where investment is made by the deceased subsequent to execution of the will. It is to ascertain whether the intention of the deceased was to give the amount to the joint holder on the basis of survivorship or the said amount should form part of the estate of the deceased. I am of the opinion that such exercise can only be carried out after oral evidence is laid in the matter. The judgment of the learned single judge

in the case of Cedric X. Pinheiro (supra) arose out of a final decree passed by the lower court and the learned judge was considering the first appeal in the said matter. Obviously at that stage the oral evidence between the parties was already laid and thus the court can determine the intention of the deceased at the time of investing the said bond jointly with one of the legal heirs of the said deceased. It is not possible to undertake the said exercise at this stage in the present case in the absence of any oral evidence in that behalf. In that view of the matter I am of the opinion that at this stage it is necessary that the amount of Rs.33.00 lacs which has been encashed by respondent no.3 must be protected and the same be made available at the time of final determination of the petition. In view thereof I am of the opinion that the following order is required to be passed in respect of the said amount of Rs.33.00 lacs which has been encashed by defendant no.3.

6. Defendant no.3 is directed to deposit

with the office of the Prothonotary and Senior Master the said sum of Rs.33.00 lacs within a period of 8 weeks from today alongwith the amount of accrued interest which he has received at the time of encashment of the bond. The said amount will be deposited by the Prothonotary and Senior Master in fixed deposit of any nationalised bank initially for a period of three years and renew the same from time to time till further orders are passed by this court. With the aforesaid directions the present notice of motion is disposed off accordingly. No order as to costs.

sd/-

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